ORIENTAL BANK BHD.

v.

JAAFAR SIDEK MOHD. SALAM & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[SUIT NO. C3-23-1314-87]
7 FEBRUARY 1990

BANKING: *Overdraft facility - Personal guarantees - Pledged shares - Entitlement of guarantors to know the true extent of the principal borrower's liability - Disclosure of amount realised from sale of shares - Interest rate calculation - Disclosure of base lending rate.*

CIVIL PROCEDURE: *Appeal against dismissal of application for further and better particulars - Pending appeal against O. 14 judgment - Verification of 1st defendant's account with the plaintiff - Conclusive evidence clause - Correctness of certificate issued on indebtedness - Request not objectionable or oppressive - Disclosure of material facts.*

The 1st defendant was granted an overdraft facility amounting to RM250,000 by the plaintiff on 28 February 1985. The overdraft was secured by the deposit of public listed shares from time to time, and at all times, they provided a 60% margin on the advances made by the plaintiff. The overdraft was also secured by a guarantee dated 8 January 1985 executed by the 2nd and 3rd defendants.

The plaintiff recalled the overdraft on 11 December 1987, demanding payment of RM234,698.30 due and owing as at that date from all the 3 defendants.

On 14 May 1989 the 2nd and 3rd defendants/guarantors applied for further and better particulars in respect of the statement of claim. Their application was dismissed with costs and they now appeal to this Court against that order.

The plaintiff objected to their application in this Court on the following grounds:

1. The application is nothing more than an attempt to confuse the issues and to delay proceedings.
2. The application had the effect of going behind the conclusive evidence clause in the guarantee.

Held:

[1] The defendants, as guarantors, are entitled to know the true extent of the principal borrower's liability as their own liability is secondary to that of the principal borrower.

[2] The presence of a conclusive evidence clause *per se*, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them.

[3] There was no disclosure as to the amount realised from the sale of the pledged shares and as to when such shares were sold.

[4] Before clause 19 of the guarantee (the circumventing clause) can operate against the defendants the plaintiff must firstly as a condition precedent establish that any certificate it issues on the 1st defendant's indebtedness is correct and conclusive.

[5] As a result of the plaintiff's reluctance to disclose material facts, Court decided to exercise its discretion to allow the defendants application for further and better particulars.

[Defendants' appeal for further and better particulars allowed, but ordered to pay costs for their delay.]

For the plaintiff - Y.H. Teh; M/s. Cheah & Teh
For the 2nd and 3rd defendants - M.T. Teh; M/s. Mah-Kok & Din

JUDGMENT

Siti Norma Yaakob J:

The 1st defendant in this suit was a customer of the plaintiff and based on that relationship, the plaintiff had granted him an overdraft facility of RM250,000 on terms and conditions contained in the plaintiff's letter dated 28 February 1985. The overdraft was secured by the deposit of public listed shares from time to time and at all times, they provide a 60% margin on the advances made by the plaintiff. Apart from the shares the overdraft was also secured by a guarantee dated 8 January 1985 executed by the 2nd and 3rd defendants. Another condition attached to the granting of the facility is that it had to be settled fully by the 1st defendant on 30 June 1985, 4 months after it had been approved to him.

The plaintiff recalled the overdraft on 11 February 1987, demanding payment of RM234,698.30 due and owing as at that date from all the 3 defendants.

On 14 May 1989, the application of the 2nd and 3rd defendant guarantors (the defendants) for further and better particulars (the application) of paras. 3, 4 and 10 of the plaintiff's statement of claim was dismissed with costs and in this instant appeal against that order, the following objections were raised:

1. The application is nothing more than an attempt to confuse the issues and to delay proceedings.
2. The application had the effect of going behind the conclusive evidence clause in the guarantee.

Judgment under O. 14 has already been obtained by the plaintiff against the defendants on 24 February 1989 but an appeal against that judgment is still pending. The application was only filed on 1 April 1989 but the defendants have explained that they had asked for particulars earlier in their letter dated 14 March 1988, but the plaintiff failed to respond.

The particulars asked for under paras. 3, 4 and 10 of the plaintiff's statement of claim is nothing more than a verification of the 1st defendant's account with the plaintiff as the defendants are not satisfied of the full extent of the 1st defendant's liability and consequently their own liability under the guarantee. They do not deny executing the guarantee but this fact should not prevent them from seeking verification of the true state of the 1st defendant's account.

It is not disputed that the 1st defendant is already adjudged a bankrupt and is presently overseas. The pledged shares have already been sold by the plaintiff but the plaintiff is most reluctant to divulge the particulars of sale or the amount realised when asked by the defendants and neither is the fact that pledged shares had also formed part of the securities or their sale, pleaded in the statement of claim. I consider that as guarantors, the defendants are entitled to know the true extent of the principal borrower's liability for after all, their own

liability is secondary to that of the principal borrower. Moreover, unlike the normal run of things, where the principal borrower is a company and the guarantors its directors, the principal borrower in this case is a private person who benefitted solely from the overdraft and whose dealings with the plaintiff may well be conducted without any conceivable knowledge of the defendants.

As for the plaintiff's objection that the application was nothing more than an attempt to go behind clause 19 of the guarantee, I do not consider there is any merit to that objection as the presence of a conclusive evidence clause, *per se*, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them. This is more so when the guarantors have no say in the affairs of the principal borrower.

In this case there is no disclosure as to the amount realised from the sale of the pledged shares and when such shares were sold. The pledged shares are public quoted shares and dealings on them are regulated by both the Kuala Lumpur and Singapore Stock Exchanges. As at 28 February 1985, the plaintiff has admitted that no less than 179,000 shares had been pledged to them and they represent a 60% margin against advances made by the plaintiff to the 1st defendant for any given time. Hence the proceeds of sales of such shares depending on the prices of the shares at the time of sale should at least reduce the 1st defendant's liability by half and yet what is demanded of the defendants is almost the limit of the guarantee.

Then again there is the imposition of the interest rate of 13.75% per annum at monthly rests. Under clause 1 of the guarantee, the defendants had agreed to pay interest at the rate or rates from the time being agreed between the 1st defendant and the plaintiff. It is not disputed that such rate was agreed at 3.75% per annum above the plaintiff's base lending rate. There is documentary evidence to show that the plaintiff's base lending rate had been reduced to 7% per annum in which case the plaintiff is only entitled to charge interest at 10.75% and not 13.75% as is now claimed.

In the light of such apparent likelihood of the 1st defendant's account being incorrect, the application cannot be intended to have the effect of circumventing clause 19 of the guarantee. For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the 1st defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under clause 19, and under such circumstances I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.

I do not see anything objectionable to the defendants requesting whether the 1st defendant enjoyed any other facility from the plaintiff prior to the overdraft now being claimed. Neither can it be regarded as oppressive for the plaintiff to disclose its base lending rate for the periods specified by the defendants. The defendants had sought verification of the true amount due to the 1st defendant and as I have stated, as guarantors under the guarantee they had executed, their liability is very much dependant on the 1st defendants's true state of indebtedness.

From the very nature of these proceedings, the reluctance of the plaintiff to disclose material facts and figures asked for by the defendants as long ago as 14 March 1988, I had decided to exercise my discretion and allow the defendants' application for further and better particulars and accordingly allowed their appeal but penalised them in costs for delaying making the application as by their dilatoriness the plaintiff had already proceeded to obtain O. 14 judgment against them.

Also found at [1990] 2 CLJ 72